

Claire Loebs Davis, WSBA #39812
ANIMAL & EARTH ADVOCATES, PLLC
2226 Eastlake Ave E #101
Seattle, WA 98102
Tel: (206) 601-8476
claire@animalearthlaw.com

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KETTLE RANGE CONSERVATION
GROUP,

Plaintiff,

v.

U.S. FOREST SERVICE, GLENN
CASAMASSA, Pacific Northwest
Regional Forester, U.S. Forest Service,
RODNEY SMOLDON, Forest
Supervisor, Colville National Forest,
TRAVIS FLETCHER, District Ranger,
Republic Ranger District, U.S. Forest
Service.

Defendants.

Case No. 2:21-cv-161

**MOTION FOR LEAVE TO
CONSIDER EXTRA-RECORD
EVIDENCE IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

1 Plaintiff respectfully moves this Court to consider extra-record evidence
2 offered in support of its Motion for Summary Judgment filed concurrently herewith.

3 Plaintiff is offering two documents for the Court's consideration:

4 (1) Mark G. Henjum, et al., INTERIM PROTECTION FOR LATE
5 SUCCESSIONAL FORESTS, FISHERIES, AND WATERSHEDS: NATIONAL FORESTS EAST OF
6 THE CASCADE CREST, OREGON AND WASHINGTON 17 (1994) (filed as Exhibit A to
7 the concurrently filed Declaration of Claire Loeb Davis ISO Motion for Summary
8 Judgment); and

9 (2) Jerry F. Franklin and K. Norman Johnson, *A Restoration Framework*
10 *for Federal Forests in the Pacific Northwest*, JOURNAL OF FORESTRY 110:429-39
11 (2012) (filed as Exhibit B to the Davis Declaration).¹

12 I. FACTS

13 The Northeast Washington Forest Coalition ("NEWFC") cited both of the
14 proffered documents in an objection filed with the U.S. Forest Service to the 2019
15 Colville National Forest Land Management Plan ("2019 Forest Plan") *See* AR 05571
16 (Exhibit A); AR 05572 (Exhibit B). At all relevant times to this litigation, Plaintiff
17 was a member of the NEWFC Board, and participated in comments and objections
18

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21 ¹ In addition, Plaintiff attached multiple exhibits to the concurrently filed Declaration
22 of Timothy J. Coleman. However, those exhibits are not included in this motion,
23 because they are submitted for the purposes of demonstrating standing, and issue
which is not subject to review on the administrative record.

1 NEWFC filed with the Forest Service. *See* Declaration of Timothy J. Coleman ¶ 5.

2 Counsel for Plaintiff asked the Forest Service to include Davis Declaration
3 Exhibit A in the administrative record, but counsel for Defendants declined. Davis
4 Declaration ¶ 2; Counsel for Defendants also declined Plaintiff's request to consider
5 Exhibit B as incorporated into the record by reference. *Id.* ¶ 3.

7 II. ARGUMENT

8 For claims challenging agency actions under the Administrative Procedure
9 Act, 5 U.S.C. § 706(2), evidence is generally limited to the administrative record.
10 *See Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005); *Citizens to*
11 *Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). However, the Ninth
12 Circuit recognizes exceptions to this general rule:

13 (1) if admission is necessary to determine whether the agency has
14 considered all relevant factors and has explained its decision, (2) if
15 the agency has relied on documents not in the record, (3) when
supplementing the record is necessary to explain technical terms or
complex subject matter, or (4) when plaintiffs make a showing of
agency bad faith.

16 *Sw. Ctr. for Biological Diversity v. USFS*, 100 F.3d 1443, 1450 (9th Cir.1996); *see*
17 *also Powell*, 395 F.3d at 1030 (“These limited exceptions operate to identify and
18 plug holes in the administrative record.”). Reviewing courts should thus consider
19 extra-record evidence when it is “for the limited purposes of ascertaining whether
20 the agency considered all the relevant factors or fully explicated its course of conduct
21 or grounds of decision.” *Asarco, Inc. v. E.P.A.*, 616 F.2d 1153, 1160 (9th Cir. 1980).
22
23

1 As explained in the concurrently filed Moton for Summary Judgment, the
2 proffered records are extra-record evidence to aid the Court in determining whether
3 the Forest Service considered all relevant factors in deciding to issue the final Record
4 of Decision for the 2019 Forest Plan. Namely, these documents are scientific articles
5 cited by Plaintiff's objection to the Plan, and integral to understanding the
6 importance of the "Eastside Screens" standard protecting old-growth forests, which
7 the 2019 Plan discontinued.
8

9 It is therefore appropriate for the Court to consider these documents as extra-
10 record evidence. *See Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d
11 754, 760 n.5 (9th Cir. 1996) ("To the extent [the extra-record] declaration is
12 submitted to show that the [agency] overlooked factors relevant to a proper
13 population viability analysis, we will consider it."); *Am. Bar Ass'n v. United States*
14 *Dep't of Educ.*, 370 F. Supp. 3d 1, 39 (D.D.C.) (consideration of such evidence is
15 "precisely what the exceptions to the general rule in APA cases permit," especially
16 where the evidence tends to contradict the Defendant's position in litigation).
17

18 CONCLUSION

19 For these reasons, Plaintiff respectfully requests that this Court consider the
20 documents submitted concurrently as Exhibits A and B to the Davis Declaration.
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ANIMAL & EARTH ADVOCATES, PLLC

/s/ Claire Loeb Davis

Claire Loeb Davis

2226 Eastlake Ave E #101

Tel: (206) 601-8476

claire@animalearthlaw.com

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/EMF system, which will send notification of this filing to all counsel of record.

/s/ Claire Loeb Davis
Claire Loeb Davis